DATUK SU GEOK YIAM & ANOR v. GLOBEMAX CORPORATION SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAJA AHMAD MOHZANUDDIN SHAH JC
[CIVIL SUIT NO: WA-22NCvC-836-11-2019]
19 MAY 2023

Abstract – *Considering that O. 29 r. 3 of the Rules of Court 2012 has specifically lists down the requirements that need to be fulfilled, and the wording of the said rule is without ambiguities, there is no requirement to insert any extraneous elements, ie, the four-point test as mentioned in the English case of The Mare Del Nord, to the said rule.*

CIVIL PROCEDURE: *Discovery – Application for – Application for entry to property to conduct inspection and relevant tests and to take pictures and videos of property for preparation of expert report – Whether conditions under O. 29 r. 3 of Rules of Court 2012 ('ROC') satisfied – Whether expert report sought to be prepared would greatly assist court – Whether applicant prejudiced if application not allowed*

The plaintiffs were a mother and son. On 28 May 2012, they entered into a sale and purchase agreement and a building agreement with the first and second defendants. Pursuant to the agreements, the plaintiffs agreed to purchase a piece of land from the second defendant and to engage the first defendant to build a bungalow house ('building') thereon. The third and fourth defendants were the engineer and architect hired by the first defendant to work on the construction of the building. On 26 September 2013, the first defendant issued to the plaintiffs the second certificate certifying that the reinforced concrete framework of the building had been completed and an invoice demanding for the payment of RM289,395. However, the plaintiffs claimed that there were serious defects, shoddy workmanship and incompletion of a particular stage of the construction works on the building and therefore refused to effect the payment of RM289,395. As a response to the plaintiffs' allegation, the first defendant contended that they had adhered to all the relevant requirements in constructing the building, and that, on 17 and 20 September 2013, its expert had already conducted several inspections on the building. The result of the inspections showed that there were only minor defects, and these had been remedied by the same expert. Nevertheless, on 22 May 2014, due to the plaintiffs' refusal to effect the payment of RM289,395, the first defendant terminated the agreement. Aggrieved by the termination, the plaintiffs filed an action against the defendants to claim various reliefs, including general, special and aggravated damages ('present action'). This was an application *via* encl. 189 by the third

and fourth defendants for an order that the plaintiffs permit them and their expert and other relevant personnel to enter the building for the purposes of: (i) conducting the (a) ten core tests; (b) 100 Schmidt rebound hammer tests; and (c) 20 sclerometer tests; and (ii) taking photographs and videos and any other activities reasonably necessary *in situ* for the preparation of an expert report ('application'). In support of the application, the third and fourth defendants had, among others, posited that: (i) since the present action would involve technical and quantum issues regarding the defects, the preparation of an expert report for the third and fourth defendants would greatly assist the court in determining the present action; (ii) on the balance of convenience, if the application was allowed, it would only cause minimal disruption to the plaintiffs since they did not reside in the building. On the other hand, if the application was not allowed, the third and fourth defendants would suffer substantial prejudice as their expert testimony would not be able to rebut the plaintiffs' expert evidence; and (iii) although in 2014 the first defendant had already prepared a technical report, the engineering consultant who prepared the report had recently suffered from a stroke and was no longer able to testify as an expert witness and to support his own report. Due to these reasons, the third and fourth defendants proposed that the application ought to be allowed. The issues that arose in determining the application were: (i) whether the tests as mentioned in the cases of *Lumb v. Beaumont* and *The Mare Del Nord* ('*Mare Del Nord*') were applicable to an application made under O. 29 r. 3 of the Rules of Court 2012 ('ROC'); and (ii) whether the preparation of an expert report by the third and fourth defendants would greatly aid the court in determining the present action.

Held (allowing application):

(1) The relevant tests and requirements can only be confined within the boundaries of the ROC itself without the necessity of importing any additional requirements that are not specifically mentioned by O. 29 r. 3. Hence, the only test that ought to be assigned was the subjective findings test which was sufficient for determining the merits of the application. All the approaches taken by Pearson J in *Lumb v. Beaumont* were adopted except the applicability test. There was no necessity to prescribe the 'good arguable case' test as provided in *Mare Del Nord* which was associated with an application for a *Mareva* injunction to an application under O. 29 r. 3 of the ROC because in so far as the standards and degrees of both types of applications were concerned, the current application did not reach the highest degree of a *Mareva* injunction, despite O. 29 r. 3 had the potential to affect the position of the opposing party. Moreover, the nature of an application under O. 29 r. 3 also differed from one under O. 29 r. 1 of the ROC. Order 29 r. 1 only specified the procedures required to apply for an injunction but it

does not provide the test that ought to be applied. As a result, it was necessary to rely on the English authorities such as the case of *American Cyanamid Co v. Ethicon Ltd* to determine the applicable tests. However, O. 29 r. 3 does not have the same effect. In this rule, the court had the necessary authority to consider any application made so that full information or evidence could be obtained in any claim or matter. (paras 33, 36 & 37)

(2) Given the nature and factual circumstances, the tests and inspection sought by the third and fourth defendants *via* the application would be able to assist the court to evaluate the parties' positions more thoroughly towards achieving justice. This and the findings that: (i) the third and fourth defendants had satisfied all the conditions as specified in O. 29 r. 3(1) of the ROC; (ii) the absence of evidence regarding the tests and inspection from the third and fourth defendants could prevent the court from deciding the technical issues fairly; (iii) it would not be in the interest of justice for the third and fourth defendants to be denied of this legal avenue; (iv) the plaintiffs would not be prejudiced at all as the court had not made any decision pertaining to the issues to be tried; and (v) the application would not cause any delay to the court, the application was allowed without any order as to costs. (paras 49-53)

Case(s) referred to:
American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***
Anton Piller KG v. Manufacturing Processes Ltd [1976] Ch 55 ***(refd)***
Erinford Properties Ltd And Another v. Cheshire County Council [1974] Ch 261 ***(refd)***
Li Ching Har And Another v. Wong Suk Kit [2018] HKCU 1183 ***(refd)***
Lumb v. Beaumont (1884) 27 Ch D 356 ***(foll)***
Mareva Compania Naviera SA v. International Bulkcarriers SA [1980] 1 All ER 213 ***(refd)***
PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd [2008] 1 LNS 679 HC ***(refd)***
Suruhanjaya Sekuriti Malaysia v. Chan Soon Huat [2017] 1 LNS 2175 HC ***(refd)***
The Mare Del Nord [1990] 1 Lloyd's Rep 40 ***(not foll)***

Legislation referred to:
Rules of Court 2012, O. 29 rr. 1, 2, 3(1), (a), (b), (c), O. 40A

Rules of Supreme Court 1883 [UK], O. 29 rr. 2, 3, O. L r. 3
Rules of the High Court [HK], O. 29 rr. 2, 3

For the plaintiffs - K L Pang & Chok Zhin Theng; M/s Cheah Teh & Su;
For the 2nd defendant - Leong Sher How; M/s Teh & Assocs
For the 3rd & 4th defendants - Chen Mian Kuang & Low Kian Seng; M/s MK Chen & Leong

Reported by Syamim Ariffin

A

JUDGMENT
(encl. 189)

Raja Ahmad Mohzanuddin Shah JC:

Preliminary

B **[1]** The third and fourth defendants are applying for an order by way of encl. 189 that the plaintiffs permit them, their expert and a company known as Test Sdn Bhd, which includes the solicitors of the third and fourth defendants, an assistant of the said expert and servants or agents of Test Sdn Bhd, to enter the plaintiffs' property including the building thereon C (the "property") for the purpose of inspecting the same and performing the following tests:

(i) ten core tests;

(ii) 100 Schmidt rebound hammer tests; and

D (iii) 20 sclerometer tests.

[2] In order to make such an order of court effective, the third and fourth defendants are also seeking permission to take photographs and videos of the property as well as perform all activities reasonably necessary *in situ* to prepare an expert report on the disputes on the property.

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[3] The above three tests and their necessity will be discussed in further detail in the following discussion.

[4] Enclosure 189 is based on O. 29 rr. 2 and 3 of the Rules of Court 2012 ("Rules") as well as the inherent jurisdiction of this court.

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Narratives Of The Parties

[5] Each party has its own story to tell. Clearly, this is a case where the ending of a story requires at least two versions. My role is not to evaluate the accuracy or truthfulness of each account advanced by either party at this G point in time. This will be determined during the trial. I set them out here to illustrate what led to the filing of encl. 189 as well as what came up between the parties in the dispute.

[6] There are two plaintiffs in this case, a mother and a son.

H **[7]** The plaintiffs claim that they purchased the property from the second defendant and engaged the first defendant to construct a bungalow building on the property. The third defendant is an architect while the fourth defendant is an engineer, both of whom were hired by the first defendant to work on the construction project.

I

[8] Initially, the parties met at a property expo in early 2012. Here, the plaintiffs met the sales and administration manager and/or representative of both the first and second defendants. The plaintiffs were offered a package that included the sale of vacant land and the provision of a contractor to build a house on such land.

[9] This resulted in the plaintiffs and the first and second defendants signing a sale and purchase agreement and a building agreement on 28 May 2012. In the former transaction, the land was purchased for the price of RM583,055 while in the latter, a bungalow was to be constructed for the price of RM1,527,210. The plaintiffs have paid full payment of the purchase price. The plaintiffs now own the property as registered owners.

[10] The plaintiffs claim that the building agreement has a specific clause that says the building is to be constructed in a good and workmanlike manner in compliance with the building standards and practices as well as in accordance with the building plan approved by the relevant authorities and the specifications stipulated in such agreement. Also implied in the building agreement was that the first defendant would exercise all due skill and care in carrying out the construction works.

[11] There was progress in the construction works. On 26 September 2013, the third defendant issued a second certificate certifying that the reinforced concrete framework of the building has been completed. An RM289,395 invoice was issued by the first defendant following this. As of that point, the plaintiffs had already paid RM474,210 for the construction contract.

[12] An unexpected turn of events followed. The plaintiffs claim that they discovered that the construction works that were the subject of the second certificate were not carried out in compliance with building standards and practices. In addition, they were not carried out in compliance with the approved building plan and the relevant specifications. A claim of failure to exercise reasonable skill and care was brought against the first defendant. Additionally, the plaintiffs claim that the third and fourth defendants failed to exercise reasonable skill and care. It was alleged that the third defendant wrongly issued the second certificate due to the existence of defects, whereas the fourth defendant was alleged to have wrongly supported its issuance.

[13] This occurred as a result of the following events. An inspection of the property by the plaintiffs on 13 October 2013 revealed serious defects and very shoddy workmanship as well as the fact that a particular stage of the works had not yet been completed contrary to the architect's certificate. In a letter to the first and second defendants that was also copied to the third defendant, this information was conveyed to them. The plaintiffs further maintained that the first defendant would not be paid for any new work done and that any defects should be rectified immediately.

[14] As a response, the first defendant informed the plaintiffs that their complaints were premature since the construction works were still underway. The plaintiffs were also informed that the third defendant had obtained the fourth defendant's confirmation that the works had been completed in accordance with his design. To this, the plaintiffs said they were planning to appoint an independent consultant to verify this.

[15] The plaintiffs then discovered that the third and fourth defendants had already inspected the site on two previous occasions on 17 September 2013 and 20 September 2013 and the first and fourth defendants had also conducted a joint site inspection. Despite the observation of honeycombs and bulging columns in the structure framework, they claimed that the structure would remain stable and intact. It was also claimed that the first defendant's expert had already conducted at least six inspections and performed the following tests:

(i) three concrete core test (CCT);

(ii) 123 Dynamic Schmidt Hammer Test (DSHT); and

(iii) 11 Sclerometer Test MG4 (STMG4).

[16] As further observations made by the expert for the first defendant, the following were reportedly made:

(i) several structural beams and columns showed superficial bulging, some of which had been hacked and repaired;

(ii) despite remedial works being undertaken, there were defective honeycombing areas and therefore, more remedial works were required; and

(iii) overall, the structure had minor defects.

[17] The plaintiffs claim that the first defendant's expert conducted tests that resulted in a large hole being knocked out of the brick wall. A few inspections were also conducted after the building agreement was terminated, according to the plaintiffs.

[18] On the other hand, the first defendant asserts that they followed all necessary procedures in managing the project. Furthermore, the first defendant claims the building agreement was validly terminated due to the plaintiffs' failure to pay the invoice for the construction works. A collective argument of the first, third and fourth defendants contends that they or their agents had inspected the said works properly and determined that based on the second certificate, construction drawings and building plans, the reinforced concrete framework of the building had been completed or substantially completed. Moreover, the third defendant claims that the fourth

defendant confirmed and verified his claim. As a whole, they said the building structure was still in good condition, contrary to what the plaintiffs had claimed.

[19] In addition, the plaintiffs claim that they complained about the defects numerous times to the first and second defendants but they did not take any action. Instead, the first defendant terminated the building agreement on 22 May 2014 due to the plaintiffs' failure to pay the RM289,395 invoice.

[20] It was because of this that this action was filed. The plaintiffs claim various reliefs, in addition to general, special and aggravated damages. This includes declarations that the first defendant terminated the building agreement invalidly and that the second certificate and its corresponding invoice are null and void.

The Law

[21] In order to proceed further with the merits of the application, I must first determine what the legal test is for an application of this nature.

[22] Enclosure 189 is based on O. 29 rr. 2 and 3 of the Rules as well as the inherent jurisdiction of this court. This makes it necessary to examine the applicable legal principles under O. 29 rr. 2 and 3 of the Rules and whether they are being applied justifiably in support of the application. Here are the provisions of O. 29 rr. 2 and 3 of the Rules:

> Detention, preservation of subject matter of cause or matter (O. 29 r. 2)
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> 2. (1) On the application of any party to a cause or matter, the Court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.
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> (2) For the purpose of enabling any order under paragraph (1) to be carried out, the Court may by the order authorise any person to enter upon any immovable property in the possession of any party to the cause or matter.
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> (3) Where the right of any party to a specific fund is in dispute in a cause or matter, the Court may, on the application of a party to the cause or matter, order the fund to be paid into Court or otherwise secured.
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> (4) An order under this rule may be made on such terms, if any, as the court think just.
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> (5) An application for an order under this rule shall be made by way of a notice of application.
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> (6) Unless the Court otherwise directs, an application by a defendant for such an order may not be made before he enters an appearance.

A Power to order samples to be taken (O. 29 r. 3)

3. (1) Where the Court considers it necessary or expedient for the purpose of obtaining full information or evidence in any cause or matter, the Court may, on the application of a party to the cause or matter, and on such terms, if any, as it thinks just, by order authorise or require:

B (a) any sample to be taken of any property which is the subject matter of the cause or matter or as to which any question may arise therein;

(b) any observation to be made on such property; or

(c) any experiment to be tried on or with such property.

C (2) For the purpose of enabling any order under paragraph (1) to be carried out, the Court may by the order authorize any person to enter upon any immovable property in the possession of any party to the cause or matter.

(3) Rule 2(5) and (6) shall apply in relation to an application for an order under this rule as they apply in relation to an application for an order D under that rule.

[23] Starting from the ground up, my primary focus will be on O. 29 r. 3 of the Rules in order to determine the test applicable in this matter. This is due to the fact that O. 29 r. 3 assigns more specific relevant elements as opposed to O. 29 r. 2 which deals with property inspections in general. As E a precondition to considering an application under O. 29 r. 3 of the Rules, I must first be satisfied that it is necessary or expedient to gather full information or evidence in the case at hand, which would ultimately assist me in resolving the dispute between the parties. There are only three instances provided under O. 29 r. 3(1)(a), (b) and (c) of the Rules for which F such evidence and information are being gathered. The first relates to any sample to be taken of any property which is the subject matter of the case or as to which any question may arise for determination. Secondly, it applies when an observation needs to be made about the property, and thirdly, when an experiment needs to be conducted on or with such a property. Eventually, G this will result in something that will need to be addressed by me during the trial.

[24] Several major authorities are referred to me by the parties as guides and assistance. This is to help me determine this issue which the parties say has not yet been fully developed in our local legal environment. The cases H named in this entry are the English cases of *Lumb v. Beaumont* (1884) 27 Ch D 356 and *The Mare Del Nord* [1990] 1 Lloyd's Rep 40 ("*The Mare Del Nord*").

[25] *Lumb v. Beaumont* (*supra*) involves a judgment rendered by Pearson J in 1884. By way of a motion, the plaintiff requested permission to enter the defendants' premises with his workmen for the purpose of inspecting the I drain coming from the defendants' cellar to the plaintiff's drain. In order to

give effect to his motion, the plaintiff claimed that he should be allowed to dig down to the drain and follow its course from the defendant's cellar to the plaintiff's drain. The plaintiff filed this action as the owner of a private drain. According to the plaintiff, the defendants had wrongly connected certain premises belonging to them to the plaintiff's drain and consequently caused sewage to be discharged into the plaintiff's drain. Basically, for the purpose of testing whether the water was coming into the plaintiff's own drain, the plaintiff needed to pour water down the defendants' drain. This led the plaintiff to seek an injunction to restrain the defendants from discharging or passing any sewage from their premises into the plaintiff's drain as well as to prevent any connection between the defendants' premises and the plaintiff's drain.

[26] Pearson J held in this case that under r. 3 of O. L of the Rules of Supreme Court 1883, which has the same basis as our O. 29 of the Rules, the court had the power to make an interlocutory order before trial giving liberty to the plaintiff to enter upon land belonging to the defendant and to excavate the soil thereof for the purposes of inspection. The court further imposed on the plaintiff an additional term that he would not cause any unnecessary damage and be responsible for rectifying any damages on his own terms. As a matter of completeness, r. 3 of O. L of the English Rules of Supreme Court 1883 provided the following:

> It shall be lawful for the Court or a Judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observations to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

[27] In *Lumb v. Beaumont* (*supra*), I believe the court, in that case, ordered the inspection in order to have the materials necessary to determine the case during trial.

[28] In *The Mare Del Nord*, the plaintiffs were owners of a cargo of gas oil loaded on board the defendant's ship called the Mare Del Nord. The cargo was unloaded in La Skhira, Tunisia. During the process, 170 tonnes were missing. In consultation with their expert, the plaintiffs were advised that such shortages were not normal and required further explanation. For this to be determined, the expert had to take samples of oil from another area of the ship that was not the cargo area. In this way, the expert could verify that if

there was a leak from the oil placed in the cargo compartment, the leak would spread from the cargo compartment to the non-cargo compartment. Other than this, the shortage could only happen by deliberate design.

In advance of the ship's expected docking at Swansea, the plaintiffs' solicitors notified the defendant's solicitors of their intention to board. According to the defendant's solicitors, they were not authorised to grant the request. By means of an *ex parte* summons, the plaintiffs sought to have the Admiralty Registrar order the defendant to allow the plaintiffs expert entry into the ship for the purposes of inspecting, photographing and taking samples from the ship's non-cargo areas and piping system, in accordance with O. 29 rr. 2 and 3 of the English Rules of Supreme Court 1883, which is similar to our own Rules of Court 2012. The Registrar granted this application. In an appeal to the High Court, the defendant argued that the Registrar had no jurisdiction to grant the order due to the fact that it acted as a mandatory injunction or an *Anton Piller* order.

[29] Sheen J dismissed the appeal that came before him. In doing so, he held, amongst others, that the plaintiffs' expert could not answer the question posed to him without seeing the general arrangement plan and the piping plan. Furthermore, he said that courts regularly made such orders under O. 29 rr. 2 and 3. It is clear that although the effect of O. 29 rr. 2 and 3 was similar to an *Anton Piller* order, an *Anton Piller* order was made by virtue of the inherent jurisdiction of the court. Despite being mandatory in form, the Registrar's order would not usually be described as an injunction, although its effect may be similar. In other words, the order was made under the provisions of rr. 2 and 3 of O. 29. In the final ingredients of such an application, Sheen J outlined what he considered the principal factors the court should consider when exercising its discretion. He considered the following matters important:

(i) whether the applicant has a good arguable case on the merits;

(ii) whether the taking of samples and analysis of, or any other experiment on, those samples may assist the judge at the trial;

(iii) a requirement that the applicant be compelled to provide an undertaking in damages should it turn out later that the property owner suffered losses as a result of the plaintiffs' order; and

(iv) the balance of inconvenience which might be caused to the property owner against the possible benefit to the applicant.

[30] Now that I have outlined the scenarios in both of the above cases, I will discuss the parties' positions regarding the test that should be applied to such an application. My first point of discussion will be the third and fourth defendants' positions.

[31] It appears to me that both parties refer to Sheen J's four-point test above. However, the third and fourth defendants argue that the ideal test ought to be the one as decided in *Lumb v. Beaumont* (*supra*) being the strict test because those are the exact terms of the statute or the Rules of the Court. A good arguable case is therefore too high a requirement for an application under O. 29 rr. 2 and 3. As an alternative, they claim that regardless of the test applied, whether it's *Lumb v. Beaumont* (*supra*) or *The Mare Del Nord* four-point test, they have met them all.

[32] On the other hand, the plaintiffs argue that *Lumb v. Beaumont* (*supra*) is an older case based on an older provision of law. Though the plaintiffs admit some of the wordings are similar, it is actually a very brief judgment that does not elaborate on the test that should be applied in such an instance, as opposed to the case of *The Mare Del Nord* which outlined the four principles for consideration. Despite this, the plaintiffs assert that *Lumb v. Beaumont* (*supra*) and *The Mare Del Nord* hold consistent positions since the four principles emphasised in *The Mare Del Nord* do not conflict with the wording necessary or expedient for obtaining full information or evidence. Generally, one would not expect provisions in court rules to state specifically what the court should consider for the entire test, according to the plaintiffs.

[33] The above analysis led me to a very pertinent question. Does O. 29 r. 3 of the Rules sufficiently cover everything a court needs to consider before making an order as guided by the case of *Lumb v. Beaumont* (*supra*) or do additional principles or requirements need to be applied as in the case of *The Mare Del Nord*? In my view, the relevant tests and requirements can only be confined within the boundaries of the Rules of the Court itself without the necessity of importing any additional requirements that are not specifically mentioned by O. 29 r. 3. In terms of the wording of the Rules, there are no ambiguities exist. By importing extraneous elements, it defeats the purpose of defining the ingredients in O. 29 r. 3 in the first place.

[34] This does not, however, mean that this type of application is easily dispensed with. A judge hearing this application still has a great deal of subjective considerations to make. On the basis of the requirement of the rules, it appears to be a subjective test left entirely at the discretion of the judge upon evaluating all the relevant facts and issues made available to him at that stage of the proceeding in order to determine for himself whether what the applicant is asking for is relevant, crucial and necessary in order to meet the ends of justice. It is critical that the judge carefully considers that the discretion he is about to exercise must eventually lead him to conclude that when making a decision during the trial, that aspect of the order applied for would be helpful and necessary for him to make such a decision. In other words, it is still up to the judge hearing the application to decide whether

such an order will help him resolve disputes between the parties at trial. Further, it must be stressed that this is always subject to the applicant satisfying any of the three conditions listed under O. 29 r. 3 of the Rules.

[35] There is more to it than that. It involves the balance of convenience. When making such a decision, the judge must consider whether allowing the application will cause any hardship or serious damage to the opposing party that will not be reversible back to the original condition. Any subjective findings by the judge will be negated if the answer is in the affirmative, regardless of how important the application's results are to the judge's decision. If, however, the impact is minimal, an undertaking of damages will automatically be imposed as a measure of protection for the opposing party.

[36] Based on my analysis of the above, it is my view that the only test I need to assign is the subjective findings test which is sufficient for determining the merits of the application before me. Before proceeding further and for clarification, I respectfully adopt all the approaches taken by Pearson J in *Lumb v. Beaumont* (*supra*) with the exception of the applicability test imposed by him for the reasons I have outlined above. I am also of the opinion that there is no necessity for me to prescribe the "good arguable case" test associated with an application for a *Mareva* injunction in an application under O. 29 r. 3 because in so far as the standards and degrees of both types of applications are concerned, encl. 189 did not reach the highest degree of a *Mareva* injunction, despite O. 29 r. 3 potentially affecting the opposing party's position, which I have discussed earlier.

[37] Moreover, the nature of the application under O. 29 r. 3 of the Rules of Court 2012 differs from one under O. 29 r. 1. Based on my observation, O. 29 r. 1 specifies only the procedures required to apply for an injunction but does not provide the court with the test it should apply. As a result, it was necessary to rely on the tests associated with the English authorities such as *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1980] 1 All ER 213, *Anton Piller KG v. Manufacturing Processes Ltd* [1976] Ch 55 and *Erinford Properties Ltd And Another v. Cheshire County Council* [1974] Ch 261 in order to determine the tests to apply. On the other hand, O. 29 r. 3 of the Rules of Court does not have the same effect. In this Rule, the court has the necessary authority to consider any application made so that full information or evidence can be obtained in any claim or matter.

Merits Of The Application

[38] I now turn my attention to the merits of the application.

[39] The third and fourth defendants argue that inspection is necessary to obtain full information and evidence for trial. There is no denying that this action involved technical issues requiring experts' opinions. The plaintiffs'

claims arose from alleged defects as opined by their experts, some of which were made before the court action was filed. The documents were not exchanged before the filing of the suit but only given to the third and fourth defendants upon request for further and better particulars.

[40] Accordingly, the third and fourth defendants claim that the following technical issues have arisen in this case:

(i) whether the alleged defect is actually a defect;

(ii) whether all the defects complained of are valid or not;

(iii) even if a defect is valid, its nature is important, whether it is minor or major; and

(iv) the method of repairing each defect.

[41] According to the third and fourth defendants, in addition to defects *per se*, those issues also pertain to quantum. It is therefore important that their expert inspects and performs the relevant tests personally which would be beneficial to compare the third and fourth defendants' positions with that of the plaintiffs' expert.

[42] I shall now examine the nature and purpose of the tests proposed by the third and fourth defendants' expert:

(i) a core test is used to determine the *in situ* compressive strength of concrete. This test is considered the most accurate way to determine its *in situ* strength;

(ii) the Schmidt rebound hammer test is used to measure the concrete's *in situ* hardness. It is a quick and non-destructive test; and

(iii) the sclerometer test is another alternative method for determining concrete strength *in situ*.

[43] In this regard, the third and fourth defendants contend that their expert's confirmation test will help me determine the relevant issues for trial. This is due to a disagreement over the building's structural integrity. While the first defendant's earlier expert report opined that the concrete had met the required design strength, the plaintiffs' expert opined that both concrete strength and durability have been compromised.

[44] The third and fourth defendants have given undertakings in damages. In terms of the balance of convenience, it has been argued that since the plaintiffs do not reside in the partially built building, encl. 189 will only cause minimal disruption. Conversely, if this application is refused, the third and fourth defendants would suffer substantial prejudice as their expert testimony would not be able to rebut the plaintiffs' expert evidence. According to the third and fourth defendants, a technical report was already

prepared for the first defendant in 2014 by an engineering consultant, Newmet Konsulten. However, the expert has recently suffered a stroke and is therefore unable to testify as an expert witness to support his report, hence the application *via* encl. 189.

[45] I will now discuss the plaintiffs' objections to encl. 189.

[46] In support of their objections, the plaintiffs relied on the decision of the Hong Kong District Court in *Li Ching Har And Another v. Wong Suk Kit* [2018] HKCU 1183 relating to Hong Kong's O. 29 rr. 2 and 3 of the Rules of the High Court, which are in *pari materia* with our provisions, where it was held that the relevant consideration in an entry and testing application is whether it is reasonable or necessary for promoting a fair and satisfactory trial. As a result of the plaintiffs' contention in *Li Ching Har And Another v. Wong Suk Kit* (*supra*), the entry and testing requested were not necessary for a just and proper trial because they did not pose a genuine issue and the court is unlikely to be aided by any test results at trial. Further delays are likely to result from the new test as well.

[47] According to the plaintiffs, all four principles enunciated in *The Mare Del Nord* are relevant and applicable to the present application under encl. 189. As a result, the third and fourth defendants have failed to meet the requirements imposed by *The Mare Del Nord* which is entirely acceptable in this type of cases. In regard to the test for a good arguable case, the third and fourth defendants have failed to meet such test. According to their expert reports, the foundation of the building contains serious structural defects which support the plaintiffs' claim. Second, the first defendant's expert report was not signed and not exhibited to an affidavit in accordance with O. 40A of the Rules of Court 2012 as required by this court's directive given during case management on 1 March 2022. In addition, the first defendant's expert report contradicts their position in the sense that their pleaded case relies on the belief that there are no defects, while the first defendant's expert report indicates that there are defective honeycombing areas and that the purported remedial measures are not satisfactory. Third, the plaintiffs claim that just because a partly constructed building is still standing does not mean there are no defects or that it would not collapse if fully constructed.

[48] Furthermore, the plaintiffs claim that the proposed inspections and tests would not be helpful to me. This is because the first defendant has already obtained their expert report, which contains numerous findings on the existence of the defects, and it appears that the third and fourth defendants intend to rely on it. Hence, the third and fourth defendants should not be allowed to rely on the expert reports of the first defendant, particularly on the issue of the existence of a "conflict", which is clearly an afterthought. Further, the tests to be conducted are also similar to those that the first defendant has already conducted. Due to this, it is unnecessary for the court to order similar tests as proposed in encl. 189.

[49] I have carefully considered both parties' submissions. Given the nature of the case and the factual circumstances involved, I believe that this report arising from such inspection and tests will help me evaluate both sides' positions more thoroughly towards achieving justice. At the same time, the third and fourth defendants have also met the three conditions listed under O. 29 r. 3(1) of the Rules, namely, para. (a) because one of the tests that the third and fourth defendants want to perform is a coring test that will evaluate the concrete's strength. In para. (b), this is the same as physically inspecting the property. Finally, para. (c) overlaps with para. (a) being the coring test, which also includes coring, hammer rebound and sclerometer tests, all of which test the concrete's strength.

Furthermore, I believe that the absence of such evidence by the third and fourth defendants will prevent me from deciding on such a technical issue fairly, especially since the defendants cannot rely on the previous expert appointed by the first defendant due to his poor health condition (see *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2008] 1 LNS 679; [2009] 7 MLJ 681).

[50] Following consideration of all the circumstances applicable in this case, it would not be in the interest of justice to deny the third and fourth defendants the right to make use of this legal avenue. Ultimately, this is a matter of discretion that I have exercised based on the facts and issues before me and how I intend to handle and dispose of the trial that will eventually determine whether or not the inspection and expert report are beneficial to me. Moreover, I am aware of the fact that expert evidence must be rebutted by another expert evidence. (See *Suruhanjaya Sekuriti Malaysia v. Chan Soon Huat* [2017] 1 LNS 2175; [2018] 9 MLJ 782).

[51] I also find that the plaintiffs will not be prejudiced in any way since I have not made any decisions about the issues to be tried which will only be decided by me during the trial of this case. All that I am deciding now is that the third and fourth defendants are allowed to submit a new expert report after complying with the terms of encl. 189. This expert report has not been given any weight at this stage.

[52] It is also my discretion to consider all other issues raised by the plaintiffs in opposing this application, such as the delay issue. On this issue of delay, I find that there was no delay in moving the court for such relief, given the existence of certain timelines including the court's direction to file the expert report as well as the plaintiffs' extension of time to the defendants to file the expert report.

[53] The above results in encl. 189 being allowed without any order as to costs. Since the plaintiffs' counsel, in addition to the third and fourth defendants' counsel, has also assisted me with detailed, thorough

A submissions, I am not awarding costs to the third and fourth defendants because I am of the belief that the development of law could not have occurred without the participation of each party.

[54] As part of the order of encl. 189, the following provisions are added:

B (i) the first defendant will not be involved – any references to him in encl. 189 will be omitted.

(ii) there must be representatives of the plaintiffs, including their solicitors, accompanying the entry of the third and fourth defendants' representatives.

C (iii) the main representative of the third and fourth defendants must accompany their agents or workers at all times.

(iv) parties are at liberty to apply.

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